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Water Rights Amendments: Changing Times, Changing Uses

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Key Points

- While the state owns surface water in Texas, private parties can own water rights (a right to a specific amount of water) that have the character of private property.
- If a water right holder wants to change anything about the water right, they need state approval.
- State approval is even required when the only change is the use to which the water will be put (e.g. a change from industrial to municipal use).
- The process for amending a water right is long, complicated, costly, and is impeding the functioning of water markets.

Texas water law makes a fundamental distinction between groundwater and surface water. Groundwater is owned by the landowner as a vested property right, which may be bought and sold subject to government regulation. Surface water, by contrast, is owned by the state. However, while surface water itself is state owned, individuals and organizations can own water rights, which have the character of private property. A water right, issued by the Texas Commission on Environmental Quality (TCEQ), entitles the owner to a given amount of water from a particular diversion point for a particular use. These rights are permanent (though they may be canceled for non-use after 10 years),[1] and may be traded or sold by willing parties for a series of state recognized "beneficial uses."[2]

The marketability of water rights is intended to ensure that water in Texas goes to its most valued uses, and provides needed flexibility for a constantly changing state. As cities grow and new industries supplant older ones, changes in the uses of water are inevitable. Allowing water rights to be traded means that water use can shift to meet changing needs without having the process centrally planned by the state. This is in keeping with the framework for water planning set up by the Texas Legislature in 1997's SB 1, which spoke of "voluntary redistribution" as a key strategy for matching water supply and demand.[3]

Drowned in Red Tape

Despite nods toward voluntary matching, regulatory red-tape often prevents the transfer of water rights from operating smoothly. Texas law requires an elaborate approval process, including public notice and hearings, if any element of a water right is to be amended. A water right owner must seek a permit "to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right." The permit approval process requires, among other things, public notice and a contested case hearing (which is actually not a single hearing, but a long set of evidentiary procedures).

When the water right amendment in question involves a change in the amount of water or point of diversion, such safeguards might make sense, as this is effectively creating a new water right. By contrast, contested case hearings make little sense when the only change is the purpose for which the water will be used. State law lists a numbers of "beneficial uses" of water for which permits can be granted. A change in use from one of these recognized beneficial uses to another thus does not implicate any public interest requiring governmental scrutiny.

Previous Streamlining Attempts

To deal with this problem, the Legislature added the "four corners provision" to the Texas Water Code:

> Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.[4]

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Despite this seemingly clear injunction, the notice and hearing provisions are still being used to slow down the process of granting change of use amendments. In 2001, for example, the City of Marshall sought approval to change the use on an existing water right from a municipal to an industrial use. Nearby cities objected, seeking a contested case hearing. When TCEQ indicated its position that a contested case hearing was not available for a mere change in use, these parties sued. After several years of litigation, the Texas Supreme Court held that contested case hearings could be required even for a mere change of use.[5] The Court, however, did not make clear exactly in which circumstances the notice and hearing requirements applied.

The Texas Supreme Court's decision in *Marshall v. Uncertain* has lived up to its name in creating increased uncertainty around the water rights amendment process. Under the decision, it is no longer clear when a contested case hearing is available. Even if ultimately granted, the cost and delay of obtaining authorization from the TCEQ can be a major impediment to water right holders.

Conclusion and Recommendations

Fortunately, there is a simple way to fix this problem. The Legislature can and should specify that water right amendments for change of use are automatic, and do not require TCEQ approval. This would help TCEQ focus on those water right amendment applications that pose thornier problems, which could speed the process across the board.

New shifts in water use are a constant feature of a dynamic economy. For Texas to thrive, it needs to minimize government roadblocks to these changes and allow markets to function. Reforming the process for amending a water right for change of use is one small way Texas can get water flowing to where it is most needed.

Endnotes

[1] TWC 11.172.
[2] TWC 11.0235(a).
[3] TWC 16.051(d).
[4] TWC 11.122(b).
[5] *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2005).